IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11/03/2004

CORAM

THE HONOURABLE MR.JUSTICE M. CHOCKALINGAM

SECOND APPEAL NO.1208 OF 1993

1. P. Gunabalan
2. P. Elango
3. P. Chandrasekaran
4. P. Kuppusami .. Appellants

-Vs-

1. A. Subbiyan
2. T. Arumugham .. Respondents

This second appeal is preferred under Section 100 of CPC against the judgment and decree made in AS No.214 of 1992 dated 22.4.1993 on the file of the Appellate Authority-cum-third Additional Subordinate Judge, Coimbatore reversing the judgment and decree made in OS No.768 of 1988 dated 4.3.1992 on the file of the learned First Additional District Munsif, Coimbatore.

!For Appellants : Mr.M. Chinnasamy, SC
for Mr.S. Haja Mohideen Gisthi

^For Respondents : Mr.S.Jayaseelan
for Mr.V.Manohar for R1
No appearance for R2

:JUDGMENT

The plaintiffs, in a suit for declaratory relief in respect of the passage and consequential mandatory injunction, have challenged the judgment of the learned Subordinate Judge, Coimbatore made in AS No.214 of 1992 wherein the judgment of the trial court granting decree in their favour was reversed.

2. The following facts are noticed in the plaint averments: The plaintiffs are the sons of one Palaniappa Gounder, who was the absolute owner of the suit property by virtue of the registered sale deed dated 21.4.1969. He died in the year 1980 leaving the plaintiffs as heirs and they have been in occupation and enjoyment of the suit property. The plaintiffs entered into a division of the suit properties under a registered instrument dated 9.6.1990. The suit property was allotted to the share of the plaintiffs 2 and 3. Thereafter, the plaintiffs 2 and 3 have sold the same to the fourth plaintiff under a registered sale deed dated 3.6.1991. The second defendant was the owner of the property situated on the south of the suit property and he sold

the same to the first defendant. Thus, the first defendant became entitled to the property situated on the south under sale deed dated 16.2.84. The plaintiffs were entitled to the space measuring 1-1/2 feet North South and 48-3/4 feet East West on the south of the plaintiffs' southern wall. They have been using the said space to approach their southern wall for maintenance and repairs. The plaintiffs and the predecessor-in-title were enjoying the same for more than 50 years. The sale deed executed by the second defendant in favour of the first defendant on 16.2.1984 recognise the right of the plaintiffs and the sale was subject to the right of the plaintiffs on the said passage. After the purchase, the first defendant tried to interfere with the right of the plaintiffs. When there was an interference, an panchayat was convened on 26.1.1985. The decision arrived thereat was accepted by both the parties. It was agreed that the defendants should remove the offending construction within a period of 11 months, but they have not done so. Under

the stated circumstances, there arose a necessity for declaratory relief along with consequential mandatory injunction for removal of the offending construction.

3. The suit was resisted by the defendants inter-alia stating that the suit was bad for non joinder also; that the plaintiffs were never in occupation of the alleged suit passage; that there was no vacant space between the plaintiffs' and the defendants' property; that three rooms were constructed; that they were assigned Door Nos.83, 84 and 85; that they were abutting the southern wall of the plaintiffs for the past 50 years; that neither there was any space nor was enjoyed by the plaintiffs at any point of time; that the first defendant was the only owner of the suit property; that there was no such passage as alleged in the plaint; that even assuming that the plaintiffs had got any right of easement, had extinguished long back; that the plaintiffs have not stated when the alleged encroachment was made; that the vendor of the first defendant cannot confer any easement, which was not in existence; that the said panchayat Muchalika was not valid; that it was tainted with coercion and compulsion, and thus, it was not a valid document.

4. The trial court framed necessary issues, tried the suit and decreed the same. An appeal was preferred by the aggrieved defendants. The appeal was allowed, and the judgment of the trial court was set aside. Hence, this second appeal has been brought forth by the plaintiffs in the suit.

5. At the time of admission, the following substantial questions of law were formulated by this Court for consideration: 1) The Lower Appellate Court failed to consider the admission of the respondent that in his sale deed the right of the petitioners has been reserved. Failure to consider such an admission is a question of law calling for interference under Sec.100 C.P.C. 2) Even if for any reason the relief of declaration of title could not be granted, the lower appellate court should have granted decree on the basis of the grant of easement subject to which the respondent got his property by virtue of Order VII, Rule I C.P.C. 3) Whether evidence contradicting the terms of the Panchayat Muchalika agreement can be let in or any right claimed contrary to the terms thereof?

6. Heard the learned counsel for the appellants and also the learned counsel for the respondents on those contentions.

7. The suit property, as could be seen from the plaint, in respect of which the relief of declaration of right and mandatory injunction were sought for is a small space measuring 1-1/2 feet North South and 48-3/4 feet East West on the south of the plaintiffs' southern wall. It is not in controversy that the plaint schedule property originally belonged to one Palaniappa Gounder and on his death, it came to the hands of his heirs. There was a partition among his sons and it was allotted to plaintiffs 2 and 3, who in turn sold the same in favour of the fourth plaintiff on 3.6.1991 by way of a registered sale deed. At this juncture, it has to be pointed out that the suit mentioned space is not mentioned therein. Had it been true that either the fourth defendant, who is the present title holder or the plaintiffs 1 to 3, who got the property from Palaniappa Gounder or the predecessor-intitle Palaniappa Gounder, who got title from Chinnasamy Gounder on 21.4.1969 by way of a sale deed, got any such passage as put forth by the plaintiffs, they should have mentioned it therein and the right available therein also, but not done so. The second defendant was the owner of the property situated on the south of the house of the fourth plaintiff and he has also sold the same to the first defendant, and thus, the first defendant was the present owner of the immovable property situated on the south of the fourth plaintiff's house. According to the plaintiffs, in between these two houses, there lies a small passage.

8. The consistent case of the defence was that there was no such passage at any point of time nor was used by the plaintiffs' predecessor-in-title or by the plaintiffs and the constructions were raised long back by the defendants and their predecessor-in-title, but there was no space at all. As pointed out earlier, the plaintiffs have not filed any documentary evidence to show that there was any passage at any point of time. The further case of the plaintiffs' was that there was a panchayat convened and the document was entered into recording the decision arrived at therein and the defendants undertook to remove the offending constructions within a period of 11 months therefrom. The first appellate court has rightly rejected the same for lack of registration and apart from that it did not refer to anything about the passage, in question and rightly too. Apart from that P.W.2's evidence, who was examined on the side of the plaintiffs, was not consistent with the plaintiffs' case.

9. It remains to be stated that when the defendants came forward with the defence plea stating that there was no space at all in between these two houses as claimed by the plaintiffs, it becomes necessary for the plaintiffs to take out a commission to inspect the property and to file his report bringing to the notice of the Court the lie of the property, but he has failed to do so. All the above would clearly indicate that the plaintiffs have thoroughly failed to prove the existence of passage or any right alleged to have been available for them or used the same in the past. Hence, the first appellate court was perfectly correct in setting aside the judgment of the trial court. This Court is unable to notice any reason to interfere in the judgment of the first appellate court. Hence, the judgment of the first

appellate court is sustained.

10. In the result, this second appeal fails and the same is dismissed, leaving the parties to bear their costs.

Index : Yes
Internet : Yes

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To
1. The Appellate Authority-cum-
III Additional Sub Court,
Coimbatore
2. The I Additional District Munsif,
Coimbatore
3. The Record Keeper, VR Section,
High Court, Madras